

October 30, 2023

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington D.C. 20210

Dear Acting Secretary Su:

On behalf of the National Association of Insurance Commissioners (NAIC), the standard setting organization representing the chief insurance regulators in the 50 states, the District of Columbia, and the United States territories, we write to you regarding the confusion and costly expenses some workers and retirees are facing with the transition to coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) accompanied by eligibility for Medicare. We urge the Department of Labor to move beyond education for employers and enact rules or issue guidance that prohibit COBRA continuation coverage under group health plans from limiting benefits due to an enrollee's entitlement to Medicare without enrollment.

When an individual has more than one source of health coverage, coordination of benefits rules or Medicare secondary payer regulations apply to determine what amount each coverage source pays for the individual's health care services. The rules deem one plan as the primary payer and another as the secondary payer.

COBRA grants temporary continuation of coverage to individuals enrolled in group health plans when coverage would otherwise end upon the occurrence of a qualifying event. Under Title 18 Section 1862 (b)(1)(A) of the Social Security Act, for individuals who turn 65 and are enrolled in Medicare and are still employed and covered under the group health plan, Medicare is the secondary payer and the group health plan is the primary one.

However, the Social Security Act does not clearly address the situation when a person has turned 65, retires/separates from employment, chooses continuation coverage under COBRA, and is enrolled in Medicare Part A but not Part B and/or Part D. In its silence, it appears that COBRA coverage is secondary and Medicare is primary once the person is no longer a current employee. While this makes sense if the person is enrolled in Medicare (as automatically occurs for Part A when the person turns 65), it is less clear how the secondary payer rules work if the person chooses NOT to enroll in Part B and/or Part D even though they are eligible to do so. Consumer groups have identified situations where the COBRA group health plans paid for services for a retiree, then learned that the individual is eligible for Medicare Part B. The plan subsequently tried to recoup paid claims, even though they have no primary coverage. Thus, the retiree is left without any coverage for Part B services, despite having paid COBRA premiums.

An example brought to our attention is of a gentleman who signed up for Medicare Part A at age 65 but did not sign up for Part B as he was still working. At age 76, he left employment and his employer provided eight months of COBRA as part of his separation agreement. The COBRA carrier paid benefits as the primary plan, but after six months the carrier discovered the gentleman was *eligible* for Medicare but was not *enrolled* for benefits. The gentleman had large medical expenses during this time and the carrier sought recovery for \$80,000 of benefits paid by the COBRA plan.

Other federal agencies have issued conflicting guidance on related issues. An Internal Revenue Service (IRS) regulation addresses the duration of COBRA continuation coverage and states that “merely being eligible to enroll in Medicare does not constitute being entitled to Medicare benefits.” However, it also states that Medicare entitlement begins on the date of enrollment in Medicare Part A or Part B, whichever is earlier. Interpreting the date of entitlement in this way puts beneficiaries at risk for situations like the one above. [See Q-3 of 26 CFR § 54.4980B-7 - Duration of COBRA continuation coverage.](#)

The Centers for Medicare & Medicaid Services clarified in a [May 24, 2023 FAQ](#) that when an individual is enrolled in non-grandfathered individual health insurance coverage, the health insurer may not reduce benefits due to eligibility for Medicare without Medicare enrollment. However, an earlier [FAQ issued in 2016](#) permits such benefit reductions for those enrolled in employer group “retiree only” coverage.

We believe that federal agencies, including yours, should apply a commonsense rule to COBRA plans, individual health insurance, and other coverage sources: those entitled to Medicare Part B but not enrolled in it should not lose benefits they pay for from a non-Medicare coverage source. We appreciate the Department’s efforts to educate plan sponsors and enrollees about the potential risks of COBRA and Medicare interactions. However, we believe more action is necessary to protect retirees. We request the Department issue a rule or guidance that prohibits COBRA plans from reducing benefits for enrollees eligible for, but not enrolled in Medicare Part B or D.

Medicare enrollment and penalties, secondary payment rules, and COBRA are confusing and additional clarification is needed regarding which coverage, Medicare or COBRA, is primary and which is secondary in these situations.

The NAIC requests you to examine this issue and we, as state insurance regulators, are prepared to work with you to find solutions to aid and help our workers and retirees navigate this confusing interaction between COBRA and Medicare.

Sincerely,

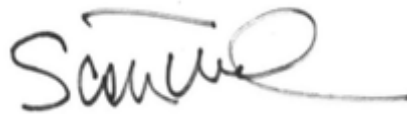


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